... The receiver is the agent of the company, not of the debenture holder, the bank. He owes a duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to the company (of which he is the agent) to clear off as much of its indebtedness to the bank as possible, but also owes a duty to the guarantor, because the guarantor is liable only to the same extent as the company. The more the overdraft is reduced, the better for the guarantor. It may be that the receiver can choose the time of sale within a considerable margin, but he should, I think, exercise a reasonable degree of care about it. *The debenture holder, the bank, is not responsible for what the receiver does except in so far as it gives him directions or interferes with his conduct of the realization. If he does so, then it too is under a duty to use reasonable care towards the company and the guarantor.* (Emphasis mine)

With respect, I entirely agree with the statement of law in the above case which was cited with approval by VC George J in *Development & Commercial Bank Bhd* v *Almas Motors Corporation (M) Sdn Bhd & Ors.*[2] In my opinion, however, the *Standard Chartered Bank* case[1] does not assist the defendants for that case can be easily distinguished from the present case in that the second and third defendants are not the agents of the plaintiff. Furthermore, as emphasized, the plaintiff is not responsible for the act of the second and third defendants in the sale of the land; neither did the plaintiff give any direction or interfere with the act of those defendants. If at all the second and third defendants are treated to be agents, they are the agents for the other defendants. Thus the other defendants must take the responsibility of the acts of the second and third defendants. As such I am of the view that there is no merit in the contention of the defendants of this ground.

As to the first ground it was contended on behalf of the defendants that there were discrepancies in the affidavit of Ng Yin Hing affirmed on 7 December 1988. No figures were ever mentioned in that affidavit. The affidavit referred to the statement of claim which was subsequently amended to take into consideration the sum of $280,000 which was paid by the second and third defendants to the plaintiff. The amount due and pavable at the time of the hearing of the O 14 application before the learned senior assistant registrar was as stated in the affidavit of Lim Jian Hoo affirmed on 14 July 1987. The defendants failed to adduce any evidence to show that the amount stated is wrong in order to raise a triable issue. It is only the allegation of the defendants that the value of the land was more than $280,000 and thus the amount due and payable to the plaintiff should be much less. For the reasons I have stated above I am satisfied that the land was sold at $280,000 and this sum had been taken into account by the plaintiff.

In passing, learned counsel for the defendants submitted that s 94 of the Contracts Act 1950 to be applicable in this case. In my view s 94 is not applicable in this case for the simple reason that sale of the land was not carried out by the plaintiff but by the second and third defendants who are the owners and the chargors of the land.

Accordingly, I am of the view that there is no merit in the appeal of the second to sixth defendants and that they did not raise any triable issue. As such I dismiss this appeal with costs.

Appeal dismissed.

Solicitor: *Chye, Chow, Chung & Co; Arifin & Partners.*

Reported by *Wong Kim Fatt*

Perwira Habib Bank Malaysia Bhd v Syarikat Johor Tenggara Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – SUIT NO C23-2306-86
GUNN CHIT TUAN J
4 MAY 1989

Civil Procedure – Summary judgment against defendants – Guarantee – First defendant principal debtor – Other defendants guarantors – Principal debtor setting up counterclaim – Stay of execution – Whether judgment against guarantors ought to be stayed pending disposal of counterclaim

Contract – Guarantee – Judgment against principal debtor and guarantors – Principal debtor setting up counterclaim – No provision in guarantee for payment of debt free of set-off or counterclaim – Whether guarantors excused from payment pending disposal of counterclaim

The plaintiff, a commercial bank, obtained summary judgment against all the defendants for repayment of a debt. The first defendant was the principal debtor while the remaining defendants had stood guarantee for the repayment of the debt. The guarantors contended that execution of the judgment against them could be stayed pending the disposal of the principal debtor's counterclaim against the bank. The contract of guarantee did not provide that payment of the debt should be made free of any set-off or counterclaim.

Held, setting aside the stay of execution:
It was not contended by the defence that the amount for which summary judgment was granted was not due, and having considered that courts in this country hearing commercial cases ought to follow the trend of authorities in the appellate tribunals of other Commonwealth countries such as the United Kingdom and the Republic of Singapore and recognize business realities by taking notice of the commercial purpose of guarantees, the purport, utility and obvious intent of which are to ensure that creditors would be paid early by guarantors when the principal debtors are unable or unwilling to do so, no stay of the judgment against the guarantors shall be granted.

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02-91 of 1989.]

Cases referred to

1 *PH Grace Pte Ltd & Ors* v *American Express International Banking Corporation* [1987] 1 MLJ 437 (folld)
2 *Continental Illinois National Bank and Trust Company of Chicago* v *Papanicolaou* The Times, 15 July 1986; [1986] 2 Lloyd's Rep 441 (folld)
3 *Hyundai Shipbuilding & Heavy Industries Co Ltd* v *Pournaras* [1978] 2 Lloyd's Rep 502 (folld)
4 *Hyundai Shipbuilding & Heavy Industries Co Ltd* v *Papadopoulos* [1980] 1 WLR 1129 (refd)
5 *Lep Air Services Ltd* v *Rolloswin Investment Ltd* [1973] AC 331 (folld)

Legislation referred to

Rules of the High Court 1980 O 14 r 1, O 56 r 2

Siew Yew Ming for the plaintiff.
Choo Keng Hee for the defendants.

Cur Adv Vult

Gunn Chit Tuan J: This is an appeal by the abovenamed defendants against that part of my decision whereby I set aside my order made in chambers for a stay of execution against the second to the eighth defendants pending determination of the first defendant's counterclaim against the plaintiff. All the defendants had appealed to the judge in chambers against the decision of the learned registrar who, on 12 October 1987, had ordered that the plaintiff be allowed to sign final judgment against them pursuant to O 14 r 1 of the Rules of the High Court 1980, and that the costs of the application be borne and paid by the defendants.

After hearing arguments in chambers on 12 May 1988, I allowed the appeal in part by varying the rate of interest awarded by the registrar from 16.5% pa to 8% pa from 12 August 1987, to the date of realization, but upheld the registrar's decision to enter judgment in favour of the plaintiff. I also ordered that there be a stay of execution against all the defendants pending disposal of the first defendant's counterclaim against the plaintiff. The plaintiff was dissatisfied with the order made by me in chambers and applied for adjournment to open court for further arguments, but the abovenamed defendants did not so apply under O 56 r 2 of the Rules of the High Court 1980.

On 28 February 1989, Mr Siew Yew Ming, counsel for the plaintiff, submitted that there should be no stay of the execution of the judgment pending disposal of the first defendant's counterclaim unless there was a plausible counterclaim which was not frivolous or vexatious. He submitted that the first defendant had not made out a plausible counterclaim as its claim for misrepresentation was without reasonable chance of success. As against the second, third, fourth, fifth, sixth, seventh and eighth defendants, counsel for the plaintiff submitted that they were not entitled to avail themselves of the first defendant's counterclaim whatever its merits. He referred to *PH Grace Pte Ltd & Ors* v *American Express International Banking Corporation*[1] at pp 440-442 and stated that the material facts of that case were similar to the present case and the Court of Appeal of Singapore had ruled that although at common law guarantors were entitled to avail themselves of the counterclaim of the principal debtor, yet in that case there should be no stay of execution on the judgment against the guarantors. He pointed out that the Singapore Court of Appeal had ruled that as the whole purpose of a guarantee was to secure quick payment in the event of default by the principal debtor, it would be inconsistent with commercial realities to stay execution of judgment obtained against guarantors of a loan pending disposal of a counterclaim set up by the principal debtor. Counsel also pointed out that Thean J in that case had quoted with approval the following passage from the English Court of Appeal decision in *Continental Illinois National Bank and Trust Company of Chicago* v *Papanicolaou*:[2]

> Guarantees such as these are the equivalent of letters of credit and only in exceptional circumstances should the court exercise its power to stay execution. The fact that a counterclaim which was likely to succeed existed would not by itself be enough ... It might be that the existence of such a counter-claim coupled with cogent evidence that the bank would, if paid, be unable to meet a judgment on the counterclaim would suffice, but nothing of that nature arises here.

In so far as the second, third, fourth, fifth, sixth, seventh and eighth defendants were concerned, it was the contention of Mr Choo, counsel for the abovenamed defendants, that at common law they were entitled to avail themselves of the counterclaim or set-off of the first defendant. He referred to the following passage in 20 *Halsbury's Laws of England* (4th Ed) para 190:

> On being sued by the creditor for payment of the debt guaranteed, a surety may avail himself of any right of set-off or counterclaim which the principal debtor possesses against the creditor, and any division of the High Court can give effect to it or to any equitable defence raised.

which was also referred to by Roskill LJ (as he then was) in *Hyundai Shipbuilding & Heavy Industries Co Ltd* v *Pournaras*[3] at pp 506 and 508 when he dealt with the common law right of a guarantor to avail himself of a right of set-off which a principal debtor has against the creditor. Mr Choo contended that whether the guarantors were entitled to the benefit of the set-off or counterclaim (if any) so as to avoid paying the sums claimed against them in these proceedings depended on the construction of the terms of the guarantee. He pointed out that the guarantee in this case did not provide that payment should be made free of any set-off or counterclaim and therefore there should be a stay of execution on the judgment against the second, third, fourth, fifth, sixth, seventh and eighth defendants. It must however be pointed out that although Roskill LJ referred to the above-quoted passage from *Halsbury's Laws of England*,

the UK Court of Appeal in *Hyundai Shipbuilding & Heavy Industries Co Ltd* v *Pournaras*,[3] in its judgment delivered by Roskill LJ himself, held that the right way of construing the guarantee was to construe it as a whole against the 'factual matrix of the background' and that factual matrix of the background was plain and not susceptible of any controversy; the commercial purport, obvious intent and true construction of the guarantee was such that the defendants' contention, that all the guarantee did was to bind the guarantor to ensure performance by the buyer of the buyer's obligations, was really not arguable; and the true meaning was that if the buyer did not pay in time the guarantor would pay and the learned judge was right in the view he took. The UK Court of Appeal also held that the defendants' several liabilities under the respective guarantees remained wholly unaffected, and although the guarantees might have been more clearly drafted, their avowed object was to enable the plaintiffs to recover from the defendants the amount due irrespective of the position between the plaintiff and the buyers. 'Otherwise, if one gave effect to this argument based on the principles set out in the passage in *Halsbury* and *Rowlatt*, the commercial utility of this particular form of guarantee would be wholly nullified' (per Roskill LJ). In effect the English Court of Appeal held that the defendants as guarantors were not entitled to the benefit of the set-off so as to avoid paying the sums claimed against them in the proceedings. The House of Lords in *Hyundai Shipbuilding & Heavy Industries Co Ltd* v *Papadopoulos*[4] at pp 1137F, 1142H, 1144B, 1144C, 1153A and B followed the decision in the *Pournaras*[3] holding that the cancellation of a contract did not deprive the builders, as creditors, of their accrued rights to payments as against the guarantors.

The Singapore Court of Appeal in *PH Grace Pte Ltd & Ors* v *American Express International Banking Corporation*[1] also pointed out that the English Court of Appeal in *Continental Illinois National Bank and Trust Company of Chicago* v *Papanicolaou*[2] had on appeal removed a stay of execution granted by the court below, holding that the commercial purpose of the transaction was that upon default by the borrower the bank should be paid quickly and that the natural meaning of the provision of the guarantee was that all set-offs and counterclaims were to be excluded. Parker LJ in that case had equated the guarantee with a bank guarantee. Reference was also made by the Singapore Court of Appeal to the following passage in the judgment of Parker LJ:

> ... Irrevocable letters of credit and bank guarantees given in circumstances such that they are the equivalent of an irrevocable letter of credit have been said to be the life blood of commerce. Thrombosis will occur if, unless fraud is involved, the courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand. We can see no relevant distinction between the guarantee in that case and the guarantees presently under consideration. The purpose of both was to ensure immediate payment if the principal debtor did not pay. Indeed the present cases make it the more necessary that the court should not interfere, for here the parties have specifically provided both in the loan agreement and the guarantees that payment should be made free of any set-off or counterclaim. It would defeat the whole commercial purpose of the transaction, would be out of touch with business realities and would keep the bank waiting for a payment, which both the borrowers and the guarantors intended that it should have, whilst protracted proceedings on the alleged counterclaims were litigated. We do not doubt that the court has a discretion to grant a stay but it should in our view be 'rarely if ever' exercised, as Lord Dilhorne said in relation to claims on bills of exchange.

The Singapore Court of Appeal also pointed out in the case before them that there was no clause specifically providing that the payment should be made free of any set-off or counterclaim but held that if a stay were to be granted it would, in their view, make nonsense of the 'whole commercial purpose of suretyship' and that 'you would lose your guarantor at the very moment you most need him' (per Lord Simon in *Lep Air Services Ltd* v *Rolloswin Investment Ltd.*[5]) Similarly, in this case it is true that the guarantee did not provide that payment should be made free of any set-off or counterclaim. But it was not contended by the defence that the amount for which summary judgment was granted was not due, and I considered that courts in this country hearing commercial cases ought to follow the trend of authorities in the appellate tribunals of other Commonwealth countries such as the United Kingdom and the Republic of Singapore and recognize business realities by taking notice of the commercial purpose of guarantees, the purport, utility and obvious intent of which are to ensure that creditors would be paid early by guarantors when the principal debtors are unable or unwilling to do so. I therefore confirmed my decision made in chambers on 12 May 1988, but set aside the order of stay against the second to the eighth defendants. I also ordered that half the costs of further arguments be paid by the defendants to the plaintiff.

Order accordingly.

Solicitors: *Soo Thien Ming & Shahrizat*; *KH Choo & Co.*

Reported by *PS Ranjan*